LIM CHEE KUO

v.

THE PACIFIC BANK BHD

HIGH COURT, KUALA LUMPUR
HAIDAR MOHD NOOR J
[CIVIL SUIT NO: D5-22-130-96]
12 DECEMBER 1997

TORT: *Malicious prosecution - Want of reasonable and probable cause - Whether there was malice - Whether malice per se sufficient - Claim in relation to bankruptcy proceedings*

The plaintiff brought an action for malicious prosecution against the defendant in relation to bankruptcy proceedings issued against the plaintiff.

The defendant had obtained judgment for RM100,000 against the plaintiff and commenced bankruptcy proceedings in execution thereof. The High Court made an adjudicating order ('AO') and a receiving order ('RO') against the plaintiff on 21 February 1990.

The plaintiff disputed the personal service on him of the bankruptcy notice ('BN') and creditor's petition ('CP') by the plaintiff's solicitors' process server ('DW2'). He also obtained the evidence of a government chemist who testified that the signatures on the BN and CP which were allegedly the plaintiff's endorsements were not the plaintiff's signature. As a result, the AO and RO were set aside on 2 December 1992 and the defendant subsequently withdrew the bankruptcy proceedings. The plaintiff then brought this action against the defendant.

Held:

[1] The elements that need to be proved by a plaintiff in an action for malicious prosesecution are: (i) the prosecution by the defendant of a criminal charge against the plaintiff; (ii) the proceedings were terminated in the plaintiff's favour; (iii) the defendant instituted the proceedings maliciously; (iv) there was absence of reasonable and probable cause; and (v) that the plaintiff has suffered damage.

[2] The setting aside of the AO and RO did not necessarily mean that the bankruptcy proceedings were instituted without reasonable and probable cause. What constitutes want of reasonable and probable cause and malice depends on the facts of each case.

[3] The plaintiff did not dispute that the bankruptcy proceedings were founded on a judgment regularly obtained and that such judgment had not been satisfied. Although there was apparently a pending appeal, there was no stay of the judgment.

[4] On the facts, the plaintiff had failed to prove that DW2 had forged his signature as alleged. The court accepted the evidence of DW2 that the BN and CP were personally served on the plaintiff, and rejected the opinion evidence of the government chemist.

[5] The defendant had showed that the bankruptcy proceedings were instituted pursuant to the provisions of the bankruptcy legislation as in any normal action taken against its debtors. There was no evidence of any abuse of process and it was the defendant's honest belief that the AO and RO were duly served on the plaintiff.

[6] The onus was on the plaintiff to show malice and absence of reasonable and probable cause. However, even if malice is proven, this by itself was insufficient if there was reasonable and probable cause for the bankruptcy proceedings. In this case, the plaintiff had failed to show any evidence which could sustain his action.

[Plaintiff's claim dismissed with costs.]

Cases referred to:
Abrath v. North Eastern Railway Co [1883] 11 QBD 448 ***(refd)***
Herniman v. Smith [1938] AC 305 ***(refd)***
Hicks v. Faulkner 8 QBD 167 ***(refd)***
Glinski v. McIver [1962] AC 726 ***(refd)***
Rawther v. Abdul Kareem [1966] 2 MLJ 204 ***(refd)***
Robin v. Sunrise Investments (Pte) Ltd [1991] 3 CLJ 3028 ***(refd)***
Tempest v. Snowden [1952] 1 KB 130 ***(foll)***
QIW Retailers Ltd v. Felview Pty Ltd & Anor [1989] 7 ALAC 510 ***(dist)***
Williams v. Taylor [1829] 6 Bing 182 ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 103

Other source referred to:
45 Halsbury's Laws of England, 4th edn, para 1348

For the plaintiff - Regina Daniel; M/s Mahinder Singh Dulku
For the defendant - GS Yap (Lee Min Choon with him); Wang Kuo Shing & Co

Reported by Anne Khoo

JUDGMENT

Haidar Mohd Noor J:

The plaintiff filed this action against the defendant for malicious prosecution and/or without reasonable and proper cause and thereby claiming for:

(a) General damages;

(b) Aggravated damages;

(c) Singapore $1,107,550 as special damages;

(d) Further and other damages to be assessed;

(e) Interest as provided by the Civil Law Act, 1956;

(f) Further or other relief as this court may deem fit in the circumstances.

The crux of the claim is that the defendant proceeded with Kuala Lumpur High Court bankruptcy No. D3-2979-89 ('the said bankruptcy proceedings") and obtained an adjudication and receiving orders against the plaintiff when the plaintiff had not been duly served with the bankruptcy notice and the creditor's petition in the said bankruptcy proceedings.

The following facts are not disputed:

(i) The defendant obtained a judgment for the sum of RM100,000 together with interests and costs against the plaintiff *vide* Kuala Lumpur High Court civil suit No. 23-1475-86.

(ii) In execution of the judgment, the defendant commenced Kuala Lumpur High Court bankruptcy No. D2-43-1320-88 against the plaintiff ("the earlier bankruptcy proceedings").

(iii) The bankruptcy notice in the earlier bankruptcy proceedings was duly served on the plaintiff on 16 August 1988 by Krishnasamy s/o Rengasamy, the process server of the solicitors for the defendant (DW2).

(iv) The earlier bankruptcy proceedings were withdrawn by the defendant with liberty to file afresh. No reasons were advanced in the proceedings before me for the withdrawal.

(v) Subsequently, the defendant filed the said bankruptcy proceedings.

(vi) On 21 February 1990 the High Court made an adjudication order and receiving order ("AO" and "RO") in the said bankruptcy proceedings.

(vii) The AO and RO in the said bankruptcy proceedings were set aside by the High Court on 2 December 1992 on the application of the plaintiff.

(viii) On 1 April 1993, the defendant withdrew the said bankruptcy proceedings.

According to the defendant, the bankruptcy notice dated 28 July 1989 ("BN") in the said bankruptcy proceedings was effected personally on the plaintiff on 9 September 1989 by DW2 (pp. 56-58 of Bundle 'B').

Similarly, the defendant claimed that the creditor's petition dated 11 October 1989 ("CP") in the said bankruptcy proceedings was effected personally on the plaintiff on 16 December 1989 by DW2 (pp. 62-67 of Bundle 'B').

The plaintiff denied the claim by the defendant in respect of the personal service of the BN and the CP on him by DW2 and denied the endorsements of the acknowledgment purportedly made by him. The plaintiff claimed that DW2 forged his signature etc as per the alleged endorsements.

The plaintiff filed an application on 5 December 1991 to set aside the AO and the RO with an affidavit in support thereof (pp. 46-55 of Bundle 'B').

The plaintiff managed to get an order for his alleged signatures on service of the BN and CP to be examined by a government chemist.

The government chemist compared those alleged signatures with the specimen in one hard-cover book "JAZIRAH TAIKO SDN. BHD. 126206". According to her report, based on the evidence available the signatures on the BN and CP did not show that they had originated from the same authorship as that of the specimen provided.

It would appear therefore that based on the government chemist report, the AO and RO in the said bankruptcy proceedings were set aside and subsequently the defendant withdrew the said bankruptcy proceedings. Hence the present action by the plaintiff.

The Law

The elements that need to be proved by a plaintiff in an action for malicious prosecution are succinctly set out in *45 Halsbury's Laws of England* (4th Edn.) para. 1348 as follows:

(1) the prosecution by the defendant of a criminal charge against the plaintiff before a tribunal into whose proceedings the criminal courts are competent to inquire;

(2) that the proceedings complained of terminated in the plaintiff's favour;

(3) that the defendant instituted or carried on the proceedings maliciously;

(4) that there was an absence of reasonable and probable cause for the proceedings; and

(5) that the plaintiff has suffered damage.

The above was quoted with approval in the Singapore case of *Robin v. Sunrise Investments (Pte) Ltd.* [1991] 3 CLJ 3028; [1991] 2 MLJ 521.

On the facts of this case, I need only to consider whether the plaintiff had proved elements (3) and (4) and thereafter, depending on my decision, will there be a need to consider element (4).

In so far as element (2) is concerned, it seems clear that the setting aside of the AO and RO and the subsequent withdrawal of the said bankruptcy proceedings does not mean that the institution of the said bankruptcy proceedings was necessarily without reasonable and probable cause. Brett MR in *Abrath v. North Eastern Railway Co.* [1883] 11 QBD at p. 448 said:

> It is not enough for the plaintiff to show, in order to support the claim which he has made, that he was innocent of the charge upon which he was tried; he has to show that the prosecution was instituted against him by the defendants without any reasonable or probable cause and with a malicious intention in the mind of the defendants, that is, not with the mere intention which was wrongful in point of fact. It has been decided over and over again that all these points must be established by the plaintiff, and that the burden of each of them lies upon the plaintiff.

What will constitute want of reasonable and probable cause and malice depend on the facts and circumstances of each case. Tindel, CJ, in *Williams v. Taylor* [1829] 6 Bing 182; 130 ER 1250 at p. 186 aptly observed:

> What shall amount to such a combination of malice and want of probable cause is so much a matter of fact in each individual case as to render it impossible to lay down any general rule on the subject; but there ought to be enough to satisfy a reasonable man that the accuser had no ground for proceeding **but his desire to injure the accused** (emphasis added).

Thompson, LP, in our Federal Court case of *Rawther v. Abdul Kareem* [1966] 2 MLJ at p. 204 quoted with approval the definition of what is "reasonable and probable cause" by Hawkins J in *Hicks v. Faulkner* 8 QBD 167, 171 which was approved by the House of Lords in *Herniman v. Smith* [1938] AC 305, 316:

> I should define reasonable and probable cause to be, an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed.

It would appear that if reasonable and probable is established, it does not matter whether there is or is not malice. Denning LJ in *Tempest v. Snowden* [1952] 1 KB 130 at p. 140 stated:

> Even though a prosecutor is actuated by malice nevertheless he is not liable so long as there was reasonable and probable cause for the prosecution.

Absence of reasonable cause cannot be inferred from malice (see *Glinski v. McIver* [1962] AC 726, 741.)

The Evidence

In this case the plaintiff did not dispute that the said bankruptcy proceedings were founded on a judgment regularly obtained against him and that such judgment had not been satisfied. Though the plaintiff claimed that an appeal was filed against the said judgment (which is about ten years now) but the appeal is yet to be heard. The reasons for the delay in prosecuting the appeal are not quite clear. Be that as it may, there is no evidence adduced by the plaintiff for an order of stay of the said judgment. The main complaint of the plaintiff is that the defendant should not proceed with the said bankruptcy proceedings when the BN and CP were allegedly not served on him.

In support of his contention he relied on the opinion of the government chemist regarding his alleged signatures on the service of the BN and CP on him. It would appear that he succeeded in setting aside the AO and RO based on the government chemist's opinion.

Before me the defendant through the evidence of DW2 tried to show that the BN and CP were in fact served on the plaintiff and duly acknowledged by him. I have then the direct evidence of DW2 and the opinion of the government chemist besides of course the denial of the plaintiff.

In respect of the service of the BN it would appear to me that the service purportedly effected on the plaintiff at 12am as deposed in paragraph one of the affidavit of DW2 (p. 56 of Bundle 'B') could not possibly be true. It appears to be a typing error. I say so because in the endorsement it is clearly stated by DW2 at p. 58 of Bundle 'B' that it was effected at 12noon. The figure 12am in paragraph one thereof, in my view, must have been influenced by the figure 12.00 am as stated in the alleged acknowledgment of the plaintiff

at p. 58 of Bundle 'B'. The question is who is likely to put the figure 12am on p. 58 of Bundle 'B'? Is it DW2 as seemed to be the contention of the plaintiff? If what is contended by the plaintiff is to be accepted, would it not be prudent for DW2 to state in the endorsement that the BN was effected at 12am and not 12noon! In any event it is highly improbable for such service to be effected on the plaintiff at 12am! I am more inclined to accept the direct evidence of DW2 as opposed to the mere opinion evidence of the government chemist. It could even be inferred that it was a devise by the plaintiff to lay a ground to deny service of the BN on him. It should be noted that in the earlier bankruptcy proceedings, the bankruptcy notice was served on the plaintiff by the same person (DW2) and admitted to by him. Therefore there should not be any question of mistaken identity of the plaintiff by DW2.

In respect of the CP there are no errors except for the denial of his signature thereon.

DW2 maintained that he saw the plaintiff put his signatures as acknowledgment of the service of the BN and CP on him. The plaintiff quite naturally, under cross-examination, denied that he deliberately signed his signatures differently on each occasion he was served with the papers. On the contrary the plaintiff claimed that it was DW2 who forged his signatures on the ground that DW2 was familiar with his signature in respect of the earlier bankruptcy proceedings. If the plaintiff wants the court to consider or accept his claim then the onus lies on him to show such forgery by DW2 (see s. 103 of the Evidence Act 1950). However, the plaintiff failed to do so.

Even assuming that DW2 wanted to "fix" the plaintiff, DW2 could very well do so in respect of the earlier bankruptcy proceedings. DW2 served the bankruptcy notice and was duly acknowledged by the plaintiff but when it came to the subsequent service of the creditor's petition, DW2 deposed that the plaintiff accepted service of it but refused to acknowledge receipt of it. In my view, DW2 could very well forged his signature if he wanted to as he had the benefit of the plaintiff's signature in respect of the earlier service of the bankruptcy notice but DW2 did not do so. In any event the plaintiff failed to show any evidence to support his claim that DW2 forged his signatures or that DW2 gained in any way by so doing or there was any ill-feelings or quarrels with the plaintiff.

The defendant had through its officer, DW1, showed that the said bankruptcy proceedings were instituted against the plaintiff based on the advice of its solicitors that the necessary provisions of the bankruptcy legislation have been complied with and it is a normal action taken just like any other bankruptcy action taken against its debtors. The said bankruptcy proceedings against the plaintiff is no exception.

The plaintiff merely said in examination-in-chief "I took this present action against the defendant because I strongly believe that the defendant has maliciously made me a bankrupt by not allowing me an opportunity to reply to their BN and CP purportedly served on me". In fact under cross-examination, he admitted that he did not have any proof of malice on the part of the defendant but believed that there was malice because "it appears that way". The plaintiff also admitted under cross-examination that there were no hard feelings between him and the officers of the defendant and further there was no reason for the defendant to victimise him but qualified by saying "but feel that I was victimised".

As is quite clear, in order to succeed on malicious prosecution, the onus lies on the plaintiff to show malice and absence of reasonable and probable cause. Even if malice is proven, this by itself is insufficient so long as there was reasonable and probable cause for the said bankruptcy proceedings. (see *Tempest v. Snowden, supra*) This is not a case on the evidence before me of the defendant having no ground for the said bankruptcy proceedings but his desire to injure the defendant.

On the evidence before me the plaintiff has miserably failed to show evidence other than to rely on beliefs, impressions and conjectures which, with respect, are insufficient to sustain an action for malicious prosecution.

The case of *QIW Retailers Ltd. v. Felview Pty. Ltd. & Anor* [1989] 7 ALAC 510 is of no assistance to the plaintiff's case as the facts are clearly different from the facts of this case.

It is my view also that there has been no evidence of abuse of the process as alleged by the plaintiff as the defendant was merely exercising its rights in accordance with the procedure laid down in the bankruptcy legislation. It was the honest belief of the defendant that the AO and RO were duly served on the plaintiff and it had no reason to suspect otherwise.

In the circumstances the plaintiff's claim is dismissed with costs.